Yap Eu Leong Sunny v Public Prosecutor

HIGH COURT (TAIPING) — CRIMINAL APPEAL NO 52–458–92
ABDUL MALIK ISHAK JC
14 JUNE 1994

Criminal Procedure *— Appeal — Abatement — Effect of death of appellant — Whether appeal abates under s 320 — Appellant sentenced to composite sentence of imprisonment, fine and penalty — Whether within exception to s 320 — Criminal Procedure Code (FMS Cap 6) s 320*

Words and Phrases *— 'Sentence of fine' — Whether includes composite sentence of imprisonment, fine and penalty — Criminal Procedure Code (FMS Cap 6) s 320*

The appellant was charged for corruptly soliciting a bribe under s 3(a)(ii) of the Prevention of Corruption Act 1961 ('the Act') and for corruptly accepting a bribe under s 4(a) of the Act. The sessions court judge acquitted him of the first charge but convicted him on the second charge. The judge sentenced the appellant to one day's imprisonment and a fine of RM4,000, in default one year's imprisonment and also ordered the appellant to pay a penalty of RM500 to the Government of Malaysia. The appellant appealed against the conviction and sentence. He, however, paid both the fine and the penalty. Unfortunately, the appellant died during the pendency of the appeal and his widow sought to continue the appeal. The question was whether the appeal abated upon the appellant's death pursuant to s 320 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). In deciding the issue, it was necessary to decide whether an appeal against a composite sentence of imprisonment, fine and penalty could be construed to be 'an appeal from a sentence of fine' within the exception stated in the second limb of s 320.

Held, ruling in the affirmative:

(1) The composite sentence of imprisonment, fine and penalty must be considered together and must not be dissected. It could not be construed as a sentence of fine within the exception in the second limb of s 320 as the words clearly refer only to an appeal against a sentence of fine and could not be read to include a sentence of imprisonment and a fine plus penalty. Therefore, the appeal against the composite sentence would abate on the death of the appellant.

(2) The appellant's widow had no locus standi to prosecute the appeal as she had no legal interest in the outcome of the appeal and the fine and the penalty had been paid by the appellant before his death. Her sentimental interest in clearing her husband's name had no merit in law.

Obiter:

Section 320 of the CPC needs to be amended to delete the words in brackets '(except an appeal against a sentence of fine)' which are redundant in view of the absence of an equivalent provision to s 70 of the Indian Penal Code which states that the fine once imposed constitutes a liability on the estate of the deceased and that the legal representatives of the deceased are entitled to ward off that liability.

[Bahasa Malaysia summary

Perayu telah dituduh kerana meminta sogokan secara korup di bawah s 3(a) (ii) Akta Pencegahan Rasuah 1961 ('Akta itu') and kerana menerima sogokan secara korup di bawah s 4(a) Akta itu. Hakim mahkamah sesyen telah membebaskan beliau daripada tuduhan yang pertama tetapi mensabitkannya atas tuduhan yang kedua. Hakim itu telah menjatuhkan hukuman penjara sehari ke atas perayu dan denda sebanyak RM4,000, atau setahun penjara jika ingkar membayar denda, dan juga mengarahkan perayu membayar penalti sebanyak RM500 kepada Kerajaan Malaysia. Perayu telah membuat rayuan terhadap sabitan dan hukumannya. Beliau, walau bagaimanapun, telah membayar kedua-dua denda dan penalti itu. Malangnya, perayu telah meninggal dunia sementara menantikan pendengaran rayuannya itu dan balunya telah cuba meneruskan rayuan itu. Soalan yang timbul ialah sama ada rayuan itu diberhentikan (abate) selepas kematian perayu mengikut s 320 Kanun Acara Jenayah (FMS Bab 6) ('KAJ'). Untuk memutuskan isu itu, perlu diputuskan sama ada suatu rayuan terhadap hukuman komposit yang termasuk pemenjaraan, denda dan penalti boleh ditafsirkan sabagai 'satu rayuan terhadap hukuman denda' di dalam batas kekecualian yang dinyatakan di dalam cabang kedua s 320.

Diputuskan, memberi keputusan yang mengiakan soalan itu:

(1) Hukuman komposit yang termasuk pemenjaraan, denda dan penalti mesti dipertimbangkan bersama dan tidak patut dipisahkan. Ianya tidak boleh ditafsirkan sebagai suatu hukuman denda di dalam batas kekecualian di dalam cabang kedua s 320 kerana perkataan-perkataan itu jelasnya merujuk hanya kepada suatu rayuan terhadap hukuman denda dan tidak boleh dibaca sebagai meliputi suatu hukuman pemenjaraan dan denda serta penalti. Oleh itu, rayuan terhadap hukuman komposit itu diberhentikan selepas kematian perayu itu.

(2) Balu perayu tidak mempunyai locus standi untuk meneruskan rayuan itu kerana beliau tidak ada kepentingan di sisi undang-undang di dalam keputusan rayuan itu dan denda serta penalti itu telahpun dibayar oleh perayu sebelum kematiannya. Tujuan sentimentalnya untuk membersihkan nama suaminya tidak mempunyai merit di sisi undang-undang.

Per curiam:

Seksyen 320 KAJ perlu dipinda untuk menggugurkan perkataan-perkataan di dalam kurungan '(kecuali rayuan terhadap hukuman denda)' yang sememangnya tidak diperlukan memandangkan ketiadaan satu peruntukan yang bersamaan dengan s 70 Kanun Jenayah India yang menyatakan bahawa suatu denda merupakan satu tanggungan ke atas harta pusaka si mati sebaik sahaja ianya dikenakan dan bahawa wakil si mati di sisi undang-undang berhak menentang tanggungan itu.]

[*Editorial Note*: The appellant's widow has appealed to the Supreme Court vide Criminal Application No 07–29–94.]

Cases referred to

Bhulan Lal v The State AIR 1954 All 783 (distd)
Duport Steels Ltd v Sirs [1980] 1 All ER 529; [1980] 1 WLR 142 (refd)
Gajapathi Rao AIR 1964 SC 1645 (refd)
Harnam Singh v The State of Himachal Pradesh AIR 1975 SC 236 (distd)
Ho Kin Luan & Anor v PP [1959] MLJ 159 (refd)
Hodgson v Lakeman [1943] KB 15 (not folld)
Lim Thian Hen & Ors v R [1953] MLJ 213 (refd)
Mohamed Ali v PP [1956] MLJ 84 (refd)
Mohamed Johan Mutalib v PP [1978] 1 MLJ 213 (refd)
Om Prakash v The State of Haryana & Anor AIR 1979 SC 1266 (distd)
PP v Chu Beow Hin [1982] 1 MLJ 135 (folld)
R v Rowe [1955] 1 QB 573; [1955] 2 All ER 234; [1955] 2 WLR 1056 (folld)
Smith Kline & French Laboratories Ltd v Salim (Malaysia) Sdn Bhd [1989] 2 MLJ 380 (refd)
State v Krishnan Pillai Madhavan Pillai AIR 1953 TC 233 (distd)
Treasury v Harris [1957] 2 QB 516; [1957] 2 All ER 455; [1957] 3 WLR 12 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 2(i), 173A(iii), 294–299, 303A, 305–307, 316, 320, 426
Juvenile Courts Act 1947 ss 12(1), 21
Penal Code (FMS Cap 45)
Prevention of Corruption Act 1961 ss 3(a)(ii), 4(a)
Code of Criminal Procedure (V of 1898) [Ind] s 431
Code of Criminal Procedure 1973 [Ind] s 394
Penal Code [Ind] s 70

Ranjit Singh (*Ranjit Singh & Co*) for the appellant's widow.
Mohd Razib bin Othman (Deputy Public Prosecutor) for the public prosecutor.

Abdul Malik Ishak JC: Two charges were levied against the appellant, a settlement officer, for corruptly soliciting a bribe under s 3(a)(ii) of the Prevention of Corruption Act 1961 ('the Act') and for corruptly accepting a bribe under s 4(a) of the Act. After a lengthy trial, the sessions court judge called the defence of the appellant for both charges and, finally acquitted the appellant of the offence under s 3(a)(ii) of the Act but convicted the appellant of the offence under s 4(a) of the Act. The public prosecutor appealed against the order of acquittal, while the appellant appealed against the order of conviction and sentence. For the conviction under s 4(a) of the Act, the sessions court judge sentenced the appellant to one day's imprisonment and a fine of RM4,000, in default one year's imprisonment. The appellant was also ordered to pay a penalty in the sum of RM500 to the Government of Malaysia within one month from the date of the sentence. By virtue of s 13 of the Act, that penalty shall be recoverable as a fine. The appellant paid both the fine and the penalty.

On 14 December 1993, the public prosecutor withdrew the appeal against acquittal filed by them earlier on, leaving only the appeal by the appellant against conviction and sentence intact. Unfortunately, the appellant died during the pendency of the appeal and his widow sought to continue the appeal.

The question for decision is whether the appeal abates upon the death of the deceased appellant.

Chapter XXX of the Criminal Procedure Code (FMS Cap 6) ('the CPC') contains provisions governing appeals. The pertinent section to refer to would be s 320 of the CPC which enacts as follows:

> Every appeal under section 306 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal against a sentence of fine) shall finally abate on the death of the appellant.

This section seems to lay down, at first blush, that an appeal against an order of acquittal (see s 306 of the CPC) shall finally abate upon the death of the accused, and all appeals under Ch XXX except an appeal from a sentence of fine, shall finally abate on the death of the appellant. If that is the appropriate interpretation, then there would not be any problem. But, unfortunately, this section is not free from criticism. The first limb of s 320 of the CPC deals with appeals against orders of acquittal, which by necessity must necessarily abate because the accused is dead — gone to meet his maker and, consequently, beyond the jurisdiction of the court. It is a well understood principle of natural justice that no order should be passed to the prejudice of a person unless he had an opportunity of being heard. The second limb of s 320 of the CPC is controlled by the words 'every other appeal under this Chapter'. Now, the question to ask is this:

what are the other appeals allowed under Ch XXX of the CPC? This necessarily involves an examination of the said Chapter in question. Thus, s 305 of the CPC prohibits a convicted person from appealing against his conviction if he had earlier on pleaded guilty to the charge. He is, however, allowed to appeal as to the extent or legality of the sentence imposed. Section 307 of the CPC allows 'any person' who is dissatisfied with any judgment, sentence or order pronounced by any magistrate's court, (which includes the sessions court (s 303A of the CPC)), in a criminal matter or case to which he is a party to prefer an appeal to the High Court against such judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged excessive severity or the alleged inadequacy of the sentence. Next, the powers of the High Court when exercising its appellate jurisdiction are listed in s 316 of the CPC, in particular para (b), where in an appeal from a conviction or in an appeal as to sentence, the judge may reverse the finding and sentence and acquit or discharge the accused or order him to be retried or committed for trial; or alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence.

In the present appeal, there is a composite order of sentence combining the substantive imprisonment with a fine and a penalty. It must be stressed that that penalty is considered to be a fine. Would such a composite order of sentence be construed not to be an appeal from a sentence of fine within the meaning of the second limb of s 320 of the CPC? It is common knowledge that an appeal from a composite order of sentence is accordingly directed against both the substantive imprisonment and the fine. The imprisonment term and the fine plus the penalty must be considered together and must not be dissected into two. Considered together, it would mean that an appeal against the composite order of sentence would abate on the death of the appellant. The appellant's widow has no locus standi to prosecute the appeal for the simple reason that it was her late husband that was convicted and not herself. There is no merit in the argument advanced on her behalf that she wanted to clear her husband's name. In construing the law, sentimental interest of the widow has no force of reckoning at all.

In India, the equivalent of s 320 of the CPC would be s 431 of the Indian Code of Criminal Procedure (V of 1898) which reads as follows:

> Every appeal under section 411A, sub-section (2) or section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

Both ss 411A(2) and 417 of the Indian Code of Criminal Procedure (V of 1898) relate to an appeal against an order of acquittal and an appeal to the High Court for enhancement of sentence, respectively. Subsequently, an amendment to s 431 of the Code of Criminal Procedure (V of 1898) was made. The Law Commission of India by its 41st report (September 1969, Vol 1 at pp 279–281) found it germane to replace the controversial s 431

of the Code of Criminal Procedure (V of 1898) with s 394 of the Code of Criminal Procedure 1973 which enacts as follows:

> (1) Every other appeal under section 377 or section 378 shall finally abate on the death of the accused.
>
> (2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.
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> Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.
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> Explanation — In this section, 'near relative' means a parent, spouse, lineal descendant, brother or sister.

The newly added proviso provides that an appeal against conviction and sentence of death or imprisonment will not abate on the death of the appellant if his near relative specified in the explanation obtains leave of the court to continue the appeal.

The Indian cases referred to by the learned counsel for the widow in regard to s 431 of the Code of Criminal Procedure (V of 1898) and s 394 of the Code of Criminal Procedure 1973, viz *Bhulan Lal v The State* AIR 1954 All 783, *Harnam Singh v The State of Himachal Pradesh* AIR 1975 SC 236, and *Om Prakash v The State of Haryana & Anor* AIR 1979 SC 1266 have no relevance in the Malaysian context, in particular in regard to s 320 of the CPC for one simple reason. That reason is this. In India, by virtue of s 70 of the Indian Penal Code, the fine once imposed constitutes a liability on the estate of the deceased and the legal representatives on whom the estate devolves are entitled to ward off that liability. Section 70 of the Indian Penal Code reads thus:

> The fine, or any part thereof which remains unpaid, may be levied, at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.

Briefly, s 70 of the Indian Penal Code enacts a rule of limitation regarding the period within which a fine may be recovered. The liability of the offender for the fine does not cease even with his death, for, on his death the fine may still be recovered from 'any property which would, after his death, be legally liable for his debts' (*State v Krishnan Pillai Madhavan Pillai* AIR 1953 TC 233 at p 234).

The three Indian cases referred by the learned counsel for the widow were decided in the context of s 70 of the Indian Penal Code and certainly could not and should not be adopted when interpreting s 320 of the CPC. Our Malaysian Penal Code (FMS Cap 45) does not have the equivalent of s 70 of the Indian Penal Code. These three Indian cases show a singular

principle in that the representative of a deceased convicted person cannot be allowed to appeal unless he can show a legal interest as opposed to a 'sentimental interest', for example, clearing the name of the convicted person; the exception is in the case of a sentence of fine. In India, where the appeal is against fine, the appeal may be permitted to be continued by the legal representatives of the deceased appellant. In India too, in the case of imprisonment, the sentence does not affect the property of the deceased accused and so the appeal abates upon his death (*Gajapathi Rao* AIR 1964 SC 1645).

On the other end of the scale, under the English law, a fine is in the nature of a monetary penalty which is due to the Crown, and when a man is sentenced to pay a fine, there at once arises a debt of record (that is, by judgment) to the Crown. Thus, where an accused was sentenced to imprisonment and fine and the sentence also provided for imprisonment in default of payment of fine, and when the accused died while serving the imprisonment without paying the fine, it was held that the fine could be recovered by the Crown from the personal representatives of the accused even after his death (*Treasury v Harris* [1957] 2 QB 516; [1957] 2 All ER 455; [1957] 3 WLR 12). In *Hodgson v Lakeman* [1943] KB 15, a fine of 35s was imposed on Hodgson after the court convicted him, in his capacity as a council's clerk, for an offence committed by the Cumberland County Council for breaching the Lighting (Restrictions) Order 1940. Hodgson entered an appeal against his conviction and on his application, the justices stated a case, but he died before the appeal could be heard by the High Court. In a short judgment, Viscount Caldecote CJ held that when an appeal to the High Court against a conviction by justices has been entered but the appellant dies before it has been heard, and it appears that his executors have an interest in the appeal, the court has jurisdiction to allow the executors to prosecute the appeal. In contrast would be the case of *R v Rowe* [1955] 1 QB 573; [1955] 2 All ER 234; [1955] 2 WLR 1056, where Ivor Clyde Rowe was convicted at Bedford County Quarter Sessions on 18 February 1955, of false pretences and sentenced to 18 months' imprisonment. On 21 February 1955, he gave notice of application for leave to appeal against conviction, but on the night of 6/7 March 1955, he died in prison. His widow then applied for leave to continue his application. Lord Goddard CJ after referring to *Hodgson v Lakeman* held that the sentence being one of imprisonment and the prisoner having died, neither his widow nor his executors or administrators had any such legal interest as would justify the court's allowing them to continue the appeal, and accordingly the application was refused.

Likewise, in the present appeal, the widow has no legal interest in the outcome of the appeal and since the fine and the penalty were paid by the deceased appellant before his death and without the benefit of an equivalent provision like s 70 of the Indian Penal Code, the widow has no locus standi to prosecute this appeal. Section 320 of the CPC needs to be amended to keep up with the times. Perhaps the Parliamentary draftsmen of the Attorney-General's Chambers may see fit to amend s 320 of the CPC in the near future to delete the words in bracket '(except an appeal against a

sentence of fine)' which are clearly superfluous and redundant in view of the absence of an equivalent s 70 of the Indian Penal Code in our Malaysian Penal Code. The composite sentence imposed on the deceased appellant cannot be construed to be a sentence of fine within the meaning of the second limb of s 320 of the CPC. Those words in brackets in s 320 of the CPC relate to a situation where upon conviction, the sentence imposed was a sentence of fine only. This must surely be the intention of the legislature for the words preceding it 'every other appeal under this Chapter' would by necessity refer to an appeal against conviction. On conviction, the sentences may take any one of the following forms:

(1) Death.

(2) Imprisonment, which may be either be:

(a) imprisonment for life;

(b) imprisonment for a definite period;

(c) imprisonment in default of a fine; and/or

(d) whipping. Section 291 of the CPC spells out the situation where whipping is finally stopped. In such a situation, the court which imposed the sentence needs to revise it and may in its discretion either remit such sentence or sentence the offender in lieu of whipping or in lieu of so much of the sentence of whipping as was not executed to imprisonment for a term which may extend to 12 months. This additional term is above any other punishment to which the offender has been sentenced for the same offence. Generally, the sentence of whipping is imposed where there is evidence of violence or brutality (see *Lim Thian Hen & Ors v R* [1953] MLJ 213, *Mohamed Ali v PP* [1956] MLJ 84 and *Ho Kin Luan v PP* [1959] MLJ 159).

(3) Fine, which is defined in s 2(i) of the CPC to include 'any fine, pecuniary penalty or forfeiture or compensation adjudged upon any conviction of any crime or offence or for the breach of any law for the time being in force by any Court in the Federation'.

(4) Compensation orders and costs. Section 426 of the CPC gives power to the court to order compensation to victims of offences and costs of prosecution. The offender must have been convicted. The payment of compensation may be made 'to any person, or to the representatives of any person, injured in respect of his person, character or property by the crime or offence for which the sentence is passed'. See *Mohamed Johan Mutalib v PP* [1978] 1 MLJ 213. Section 173A(iii) of the CPC empowers such compensation for injury or for loss (not exceeding the sum of RM50) or to pay such costs of the proceedings as the court thinks reasonable or to pay both compensation and costs. Section 294(ii) of the CPC also empowers the court to direct the offender to pay the costs of the prosecution or some portion thereof within such period and by such instalments as may be directed.

(5) Police supervision (see ss 295–299 of the CPC).

(6) Bonds for good behaviour (see ss 173A and 294 of the CPC); and

(7) Orders under the Juvenile Courts Act 1947 ('the JCA'). Section 12(1) of the JCA lists the orders which can be handed down. They include: admonishment and discharge; a discharge upon the offender entering a bond to be of good behaviour; committal to the care of a relative or other fit person; an order for his parents or guardian to execute a bond to exercise proper care and guardianship; a probation order under s 21 of the JCA; an order of committal to an approved school or Henry Gurney School; an order to pay a fine, compensation or costs; and imprisonment, if the offender is a young person.

In construing a statute, the court must always be wary and should not attempt to give the statute an effect that renders it a worthless piece of legislation (*Smith Kline & French Laboratories Ltd v Salim (Malaysia) Sdn Bhd* [1989] 2 MLJ 380 at p 382). It is also germane to state that the court must give effect to the clear and explicit language of the enacting words of the section and cannot by any stretch of imagination disregard them unless it is apparent that some other meaning is intended (*PP v Chu Beow Hin* [1982] 1 MLJ 135). Again, it had been said that where the meaning of the words in the statute are plain and unambiguous, judges should not invent fancy ambiguities (*Duport Steels Ltd v Sirs* [1980] 1 All ER 529 at p 541; [1980] 1 WLR 142 at p 157). And finally, the first task of the court is to find out the intention of the legislature for the words of a statute speak the intention of the legislature (*Maxwell on Interpretation of Statutes* (12th Ed) at pp 1 and 2). Thus, the clear words in brackets of the second limb in s 320 of the CPC refer only to an appeal against a sentence of fine and cannot be read to include a composite sentence of both imprisonment and a fine plus a penalty like the present appeal. Clearly, therefore the death of the appellant brought an immediate end to his appeal.

Appeal abated.

Reported by Kevin Ooi